IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-415

JAMES E. SALYERS,

Petitioner

v.

BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES OF ILLINOIS, GILBERT C. FITE, WOLFGANG SCHLAUCH and MARION L. ZANE,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT OF ILLINOIS, COLES COUNTY, CHARLESTON, ILLINOIS

PETITIONER'S REPLY MEMORANDUM

Respondents' opposition to your petitioner's Petition in the above entitled cause rests primarily upon your petitioner's alleged failure to comply with Illinois Supreme Court Rules 342 and 343. This issue was dealt with extensively on pages 12-18 of your petitioner's Petition. Respondent has not cited one case in opposition to petitioner's authorities which point

out the conflict between the Circuit Court's decision and the opinions of this Court concerning the relationship of due process and academia (see Appendix A1-9 and pages 18-24 of petitioner's Petition.) And the conflict is a direct conflict.

Respondents sole contention on this point is the unsupported allegation that the state court decided all issues on "adequate state grounds."

Respondents contend (p.5) that petitioner's Notice of Appeal to the Illinois Supreme Court on June 9, 1976, was "to the wrong court" which statement is erroneous as shown in my Petition (p.15). Respondent further states (p.6):

> On October 4, 1976, attorney for petitioner filed an affidavit.... Counsel for petitioner claimed to have filed a Motion for Extension of Time Within Which to File Petitioner's Brief together with a Motion to Transfer the case to the Illinois Supreme Court on the 17th day of August, 1976. Neither the Court nor the respondent received a copy of these motions.

Respondents then state (p.6) that, on October 8, 1976, they filed objections and motions to dismiss the appeal. That motion alleged only that respondent did not receive a copy of petitioner's motion and the Appellate Court's order of dismissal (Petition, B1-2) states that the dismissal is on respondents' motion.

Petitioner's counsel's affidavit of October 4, 1976, which was cited by respondents on page 6 of their reply brief quoted above clearly states that petitioner's counsel had, in fact,

mailed a Motion for Extension of Time to File Brief along with a Motion to Transfer both dated August 17, 1976, though not received by respondents' counsel. (On page 7, respondents state that petitioner filed a Motion for Extnesion of Time to File Brief on October 27, 1976, which is misleading because petitioner's counsel merely renewed his request of August 17, 1976.)

Concerning Rule 342, which is accurately quoted by respondents on page 2, an abstract is not due until such time as the brief is filed and petitioner's counsel's affidavit of October 4, 1976, stated that he had requested an extension of time to file brief on August 17, 1976, and renewed said request by motion of October 27, 1976. Rule 342 is clear in that no abstract is due until a brief is filed and an extension of time to file a brief thereby extends time for filing abstract.

The sole allegation in respondents' Motion to Dismiss of October 8, 1976, upon which the Appellate Court's Dismissal was based, is that respondents' counsel did not receive a copy of the August 17, 1976, Motion to Extend Time to File Brief. Respondents' reply brief cites not a single Illinois authority governing service of motions by mail which refute, overturn or supersede Bernier v. Schaefer, 11 Ill. 2d 525, 529 (1957); People v. Chapman, 392 Ill. 168, 170 (1945) and Kimbrough v. Sullivan, 131 Ill. App. 2d 313 (1971) or other authorities cited on page 13 of my Petition. Respondents' Reply Brief alleges only that respondents did not receive a copy of said Motion and in Chapman the Illinois Supreme Court held that dismissal was not warranted even where appellees alleged that a Motion had not been sent. Chapman held that the fact that an affidavit of service was

on file in the record was sufficient. Respondents experienced some difficulty with service by mail as shown on page 18 of my Petition, but they suffered no penalty. The Illinois Supreme Court decisions in especially Echols v. Olsen, 63 Ill. 2d 270 (1976) and also Michels v. Industrial Commission, 45 Ill. 2d 111 (1970) and City of Chicago v. Joyce, 38 Ill. 2d 368 (1967) as well as the Fourth District Appellate Court decision in Stauffer v. Held, 16 Ill. App. 3d 750 (1974), all of which authorities are evaluated in my Petition on pages 13-14, are of vital importance on this question, but respondents' Reply Brief presents no critical evaluation of these cases and, indeed, cites not one authority in opposition to them. Respondents' Reply Brief (pp.10-11) quotes from only one Illinois authority on the issue of procedural rules violations and that quotation (from People v. Thornhill, 31 Ill. App. 3d 779 (1975)) concerns an attorney's "clogged offices" which is completely irrelevant to the instant case within the context in which it is presented. See page 15 of petitioner's Petition concerning Thornhill's application to instant case.

Respondents assert (p.14); "Illinois law has been applied consistently in the manner that it was applied in this case." (Emphasis added.) This court has stated that state courts must be "reasonably consistent" in the application of local rules of procedure where federal issues are present. Sullivan v. Little Hunting Park, 396 U.S. 229, 244 (1969) and my Petition (p.17). No quotations from cases or analysis thereof are presented by respondents to support their contention. Three authorities are merely cited by respondents and analysis reveals that they are completely irrelevant. Whitley v. Frazier, 21 Ill. 2d 292 (1961) and Smith v. Township High School District, 158, 335 Ill. 346 (1929) deal with the statutory requirement that

political elections must be contested within thirty days and Lundahl v. Hansen, 147 Ill. 504 (1893) involves default of payment on a land sale. Libman v. Gibson, 93 Ill. App. 2d 65 (1968) and Johnston Ford Company v. Lewan, 71 Ill. App. 2d 420 (1966) cited on page 11 are also irrelevant. Given the numerous authorities evaluated in depth by my Petition (pp.13-14), respondents contention is without foundation.

Respondent asserts (p.10) that dismissals "have been dealt with summarily" and "pro forma" (p.11). The authorities cited in support of this contention are Moore v. Knudsen Trucking Company, Inc., 28 Ill. App. 3d 679 (1975); Davis v. Davis, 138 Ill. App. 2d 427 (1970); Harris v. Annunzio, 411 Ill. 124 (1952); Smith v. Chicago State University, 23 Ill. App. 3d 942 (1974). In Davis, the appeal was affirmed in part and reversed and remanded in part. Smith involved a civil service employee who won in the Circuit Court, the university appealed and appellee "had not appeared" and the Appellate Court reversed the judgment. Harris and Moore could not be described as 'summary' dismissals in the sense of the summary dismissal in the instant case because the court published the grounds for the dismissal and specified how the appellant failed to comply. None of which was done in the instant case. In Harris, the Illinois Supreme Court even detailed the established precedents for the action taken. In the instant case there is no precedent for the action taken, and, indeed, all the precedents are to the contrary as shown on pages 13-18 of my Petition. In line with Harris, your petitioner, and not the respondent, has detailed the precedents applicable to Rules 342 and 343 in the instant case. This Court has indicated that even if a state rule itself is not "novel," its application must not be so where petitioner has relied on prior decisions of the state court. Sullivan, supra, at 245-7. Respondent contends

(p.10) that petitioner was given "ample opportunity . . . . to state his position" but this Court has indicated that the state court must be "reasonably consistent" and explain why it has accorded different treatment to the instant case. Sullivan, supra, at 244. On summary dismissal, see especially the last paragraph on page 16 of my Petition.

Respondent presents no reply at all to the important authorities cited on page 16 of my Petition which state that an appeal will not be dismissed where such would result in injustice, where liberty or property rights are at stake, where issues of public importance are presented or where public officials violate public rules or policies.

Respondent contends (p.10) that "Petitioner had his day in Court", but only at "the trial level." Illinois Supreme Court Rule 301 states that every final judgment of a Circuit Court is appealable "as of right." This "right" of even one hearing on appeal of vital federal issues has been denied to petitioner by the summary dismissal on grounds which are contrary to the applicable decisions of Illinois Courts.

Respondent states (p.12): "The test to be applied where a litigant's procedural default might prevent vindication of his alleged federal right is whether 'the state's insistence on compliance with its procedural rule serves a legitimate state interest'. Henry v. State of Mississippi, 379 U.S. 443, 446 (1965)." Having stated this, respondent cites no Illinois authority on this important point. See pages 17-18 of my Petition which shows that no "legitimate state interest" is present on the procedural rules issue in the instant case and, hence, petitioner meets what respondent calls "the test" required for "vindication of his federal right."

Having made the above statement at the bottom of page 12, respondent (on p.13) immediately launches into a consideration of "summary judgments." Summary judgment was rendered by the Circuit Court pursuant to motions for summary judgment filed by both parties (my Petition, pages 11,14), but petitioner fails to see how that ties into respondents' consideration of whether the Appellate Court had a 'legitimate state interest' in dismissing petitioner's appeal in the Appellate Court. Perhaps respondent means to suggest that petitioner was objecting to the Circuit Court's authority to grant summary judgment for respondents as was done by the Circuit Court (Petition at A9). Petitioner's sole opposition to respondents' Motion for Summary Judgment went to the issues of the case and not to whether or not the Circuit Court had the authority to grant summary judgment.

Respondent also implies that the federal issues were only "presented to the trial court in and through a motion by the respondent for summary judgment, which motion was granted," (p.4) and that petitioner then only replied to respondents' Motion for Summary Judgment (p.5). In fact, petitioner raised the federal issues in his Second Amended Complaint as well as his Brief in Opposition to Defendants' Motion for Summary Judgment (my Petition, p.5). The federal issues were also raised by petitioner in Memorandum of Law in support of petitioner's own Motion for Summary Judgment, filed March 31, 1976, pages 5-7.

Further, the Circuit Court's decision (Petition, A1-9), contrary to respondents' claim on page 4 of his response, was based entirely on the federal issues without construction of any local state law. It is misleading for respondents to now claim that they raised the due process

issue in their Motion for Summary Judgment, especially when examination of that document shows that it deals only with construction of the Board's Policies and Fite's letters to petitioner.

Despite respondents' contention that "Constitutional questions are not in issue in the instant case," and that the "sole question" is the procedural rules, respondents Reply Brief does tentatively address the federal issues decided by the Circuit Court. If respondent means simply 'adequate state grounds,' examination of the Circuit Court's decision shows that it was based only on federal due process issues and, even though the decision did involve consideration of the state's "interest," such interest is itself part of the 'balancing' of property interests (A7-9), and is, therefore, an integral part of the federal issue and is not an "independent" state ground.

The Circuit Court did, indeed, conclude that the state's interest outweighed petitioner's interest but only after attempting to balance those interests, pursuant to Mitchell v. W. T. Grant Co., 94 S. Ct. 1895, 1908, which is itself a federal issue. Your petitioner has shown direct conflict between the Circuit Court's conclusions and applicable decisions of this Court. (Petition, pp. 18-24). In their brief opposition, respondents have said nothing in reply to petitioner's showing of direct conflicts and have cited not one authority.

Although respondents assert that the "sole question" is the procedural rules (p.11) and that the due process questions presented by my Petition are not at issue, respondent (pp.4-5) does discuss the merits of the case and the basic due process issues presented in the record. On page 5, respondents assert that the instant case

involves a "suspension for cause." As shown on pages 2-3, 6, A3-4 of my Petition, the Board's Policies contain no suspension procedure. As shown on pages 8-10 of my Petition, respondents have changed their stories several times concerning the procedures which they employed and when the "suspension" went into effect. The last theory cited in my Petition was that set forth by respondents on February 13, 1975, in their Answer to Second Amended Complaint i.e., that petitioner was "suspended and dismissed for cause" without any specification as to dates at all (Petition, p.10). It was on March 22, 1976, that the theory of petitioner's "involuntary release" was introduced (Defendants' Motion for Summary Judgment). The latest theory is now "suspension for cause."

On page 8, respondents' state that petitioner's counsel filed a "Petition for Rehearing" but rules provide only a "Petition for Reconsideration." The precise terminology is somewhat ambiguous. One authority does refer to "petitons for rehearing" in the Illinois Supreme Court. (Illinois Civil Practice After Trial, Section 12.12). Respondents allege that the correct term is "Petition for Reconsideration," but the Clerk of the Illinois Supreme Court calls it a "Motion for Reconsideration" and, hence, respondents are in error. Respondents (p.7) also cite my Petition (B1-2) to the effect that the Appellate Court's Order of Dismissal was on December 20, 1976, when the document clearly states November 19, 1976.

Respondents conclude (p.14): "Even if the questions presented by the petitioner were properly before the court, the Petition for Writ of Certiorari should be denied." But respondents' Brief in Opposition does not present any reason or cite one authority to support this contention concerning the federal due process issues presented by my Petition.

The numerous due process issues presented by the instant case are before this Court because they were decided as the sole basis for the Circuit Court's decision and the Appellate and Illinois Supreme Courts evaded the federal issues on unsubstantial grounds of local procedure. Respondent's Brief in Opposition provides not the slightest refutation of my Petition on any of the many points and issues presented, either the rules issues or the broad due process questions. All of the basic questions are presented by the Circuit Court's decision and petitioner's Petition.

Respectfully submitted,

James E. Salyers, Petitioner

Pro Se.

October 15, 1977